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91-438

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIAM A. KROLL,

Petitioner,

vs.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, AN ILLINOIS PUBLIC CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Marvin Gerstein
803 S. Grove
Urbana, Illinois 61801
(217)367-8734

Attorney for Petitioner

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment is applicable to a lawsuit pending in a federal court following a merger wherein the surviving corporation is a state agency?
2. Whether the language of the merger statute of the State of Illinois, Ill.Rev.Stat., ch. 144, par. 28d(d)(4) (1989) was so specific regarding pending lawsuits that the specific stringent language of the waiver standard of Eleventh Amendment Immunity was overwhelmingly implied?

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BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, AN ILLINOIS PUBLIC CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, William A. Kroll, prays that a writ of certiorari issue to review the Judgment - With Oral Argument of the United States Court of Appeals For the Seventh Circuit, entered on June 17, 1991. A Petition

for Rehearing in Banc filed by the Petitioner on July 1, 1991, was denied by the United States Court of Appeals For the Seventh Circuit on July 22, 1991. Notice of Issuance of Mandate was issued by the United States Court of Appeals For the Seventh Circuit on July 30, 1991.

OPINION BELOW

The official Opinion of the United States Court of Appeals For the Seventh Circuit, Nos. 89-3414 and 90-1075 entered June 17, 1991, is included in the Appendix as Exhibit A. The denial order of Petitioner's Petition for Rehearing in Banc entered July 22, 1991, by the United States Court of Appeals For the Seventh Circuit is included in the Appendix as Exhibit B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1) pursuant to petition for writ of certiorari in review of judgment entered by the United States Court of Appeals for the Seventh Circuit involving the application of the Eleventh Amendment of the Constitution of the United States.

An official Opinion was issued by the United States Court of Appeals For the Seventh Circuit on June 17, 1991, pursuant to its Judgment entered the same date. A copy of said Judgment is included in the Appendix as Exhibit A-1. The Petitioner sought timely Petition for Rehearing In Banc, before the United States Court of Appeals for the Seventh Circuit, which was denied on July 22, 1991. (See Appendix Exhibit B).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment to the Constitution of the United States: "The judicial power of the United States shall not be construed to extend any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S.Const. Amend.XI.

2. Special legislation merging the University of Illinois Athletic Association, a not-for-profit corporation, into the Board of Trustees of the University of Illinois, an Illinois Public Corporation, Public Act 86-6, 1989 Ill.Legis.Serv.299, 300-01 (West)(codified at Ill.Rev.Stat., ch.144, par.28d):

> The Board of Trustees of the University of Illinois shall be

> responsible and liable for all the liabilities and obligations of each of the corporations so merged; and any claim existing or action or proceeding pending by or against either of such corporations may be prosecuted to judgment as if such merger had not taken place, or the surviving corporation may be substituted in its place. Neither the rights of the creditors nor any liens upon the property of either of such corporations shall be impaired by such merger.

Ill.Rev.Stat., ch.144, par.28d(d)(4) (1989).

STATEMENT OF THE CASE

On January 6, 1989, Petitioner filed a lawsuit against the University of Illinois Athletic Association, an Illinois not-for-

profit corporation, the Board of Trustees of the University of Illinois, an Illinois Public Corporation and Neale Stoner, in his individual and official capacity as director of the aforesaid Athletic Association.

A motion to dismiss was filed by the Board of Trustees, predicated upon the Eleventh Amendment of the Constitution of the United States, which was allowed on June 13, 1989, with leave to the Petitioner to refile.

On July 18, 1989, Petitioner filed his amended complaint against the Athletic Association and Neale Stoner, including relief under 42 U.S.C., Section 1983, as well as other relief. On June 29, 1989, the State of Illinois enacted a merger statute allowing a merger of the Athletic Association into the Board of Trustees. Ill.Rev.Stat., ch.144, par.28d(d)(4) (1989). On June 30, 1989, the Secretary of State for the State of Illinois

issued a certificate of merger. The Board of Trustees became the surviving corporation and the Athletic Association ceased to exist as a separate entity. The merger statute as applicable provides in its entirety that:

> The Board of Trustees of the University of Illinois shall be responsible and liable for all the liabilities and obligations of each of the corporations so merged; and any claim existing or action or proceeding pending by or against either of such corporations may be prosecuted to judgment as if such merger had not taken place, or the surviving corporation may be substituted in its place. Neither the rights of the creditors nor any liens upon the property of either of such corporations shall be impaired

by such merger.

Ill.Rev.Stat., ch.144, par.28d(d)(4) (1989).

On October 4, 1989, the United States District Court for the Central District of Illinois denied the Board of Trustees' motion to dismiss filed August 16, 1989, pursuant to the Board of Trustees' reassertion of its Eleventh Amendment Immunity (See Appendix - Exhibit C.)

The Board of Trustees thereafter appealed to the United States Court of Appeals for the Seventh Circuit, No. 89-3414. Jurisdiction of the United States Court of Appeals for the Seventh Circuit was conferred by 28 U.S.C., Section 1291, as an interlocutory order based upon the Eleventh Amendment is immediately appealable under Mitchell vs. Forsyth, 472 U.S. 511, 524-30 (1985).

On December 12, 1989, the United States District Court for the Central District of

Illinois issued a supplemental Memorandum of Law and Order discussing its denial of the Board of Trustees' motion to dismiss entered October 4, 1989, regarding the Board of Trustees' reassertion of its Eleventh Amendment Immunity. (See Appendix - Exhibit D)

The Board of Trustees thereafter appealed to the United States Court of Appeals for the Seventh Circuit, No. 90-1075. Jurisdiction of the United States Court of Appeals for the Seventh Circuit was conferred by 28 U.S.C., Section 1291, as an interlocutory order based upon the Eleventh Amendment is immediately appealable under Mitchell vs. Forsyth, 472 U.S. 511, 524-30 (1985).

Thereafter, on June 17, 1991, the United States Court of Appeals for the Seventh Circuit did enter its judgment as to both appeals as consolidated as Nos. 89-3414 and

90-1075, stating:

> On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed from be, and the same are hereby, REVERSED and REMANDED, with instructions to dismiss the Board (of Trustees) from the suit, the parties shall bear their own costs, in accordance with the opinion of this Court filed this date.

The United States Court of Appeals for the Seventh Circuit issued its opinion on June 17, 1991. Said Court relied on Port Auth. Trans-Hudson Corp. vs. Feeney, 110 S.Ct. 1868, 1872 (1990) and Atascadero State Hospital vs. Scanlon, 473 U.S. 234, 238 (1985) that an Eleventh Amendment Immunity waiver must be "stated by the most express language or by

such overwhelming implication from the text as (will) leave no room for any other reasonable construction." Port Auth. Trans-Hudson Corp. vs. Feeney, 110 S.Ct. at 1873, from Atascadero State Hospital vs. Scanlon, 473 U.S. at 239-40.

On July 1, 1991, Petitioner filed his Petition for Rehearing In Banc, with the United States Court of Appeals for the Seventh Circuit. The Petition reasserted Petitioner's position that the language required for, a state agency, Board of Trustees to waive its Eleventh Amendment Immunity, under the Port Authority and Atascadero decisions, did not apply to the merger statute, Ill.Rev.Stat., ch.144, par.28d(d)(4) (1989), where said merger provided that the Board of Trustees would be liable for all the liabilities of the merged Illinois Athletic Association and any such claim existing may be prosecuted to

judgment against either of such corporations as if the merger had not taken place, or the surviving corporation may be substituted in its place. On July 22, 1991, the United States Court of Appeals for the Seventh Circuit stated that "no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing." And said Court ordered "that the aforesaid petition for rehearing with suggestion for rehearing in banc be, and the same is hereby, DENIED.

In both Port Authority and Atascadero, the issue was whether the state agency in consenting to suits being brought against them included a waiver of the agencies respective Eleventh Amendment Immunity, regarding prospective suits or causes of action.

The United States Court of Appeals for the Seventh Circuit from which this petition

for certiorari is brought has required such specific waiver language to apply to the retroactive cause of action, to the merger statute in question, Ill.Rev.Stat., ch.144, par.28d(d)(4) (1989), that was the claim of the Illinois Athletic Association prior to said merger wherein the Board of Trustees shall be liable after the merger for said claim.

REASONS FOR GRANTING THE WRIT

The Opinion Of The United States Court Of Appeals For the Seventh Circuit Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court Concerning The Application Of The Eleventh Amendment Following A Merger Wherein The Surviving Corporation Is A State

Agency As To A Claim Of The Merged Corporation.

This Petition arises from the United States Court of Appeals For the Seventh Circuit published opinion which reversed the Order of the United States District Court For the Central District Court of Illinois denying Respondent's Motion to Dismiss predicated upon the Eleventh Amendment of the Constitution of the United States.

Petitioner's Complaint had been brought against the University of Illinois Athletic Association an Illinois not-for-profit corporation regarding certain causes of action including requested relief under 42 U.S.C., Section 1983. The Complaint was filed in the United States District Court For the Central District of Illinois.

That the State of Illinois legislature subsequent to these claims against the

Athletic Association passed legislation which effectively merged the Athletic Association into the Board of Trustees of the University of Illinois, an Illinois Public Corporation providing that Board of Trustees "shall be liable for all the liabilities and obligations" of the Athletic Association. Ill.Rev.Stat., ch.144, par.28d(d)(4)(1989). And further that "any claim existing by or against" the Athletic Association "may be prosecuted to judgment as if such merger had not taken place..." Ill.Rev.Stat., ch.144, par.28d(d)(4)(1989).

The essential issue is whether the United States Court of Appeals for the Seventh Circuit appropriately applied the standard to determine waiver of the Eleventh Amendment Immunity to this cause of action. The United States Court of Appeals utilized the stringent requirement articulated in Port Auth. Trans-

Hudson Corp. vs. Feeney, 110 S.Ct. 1868, 1873 (1990) that the waiver of Eleventh Amendment Immunity exists "only where stated by the most express language or by such overwhelming implication...as to "leave no room for any other reasonable construction".

The Port Auth. decision relied heavily upon Atascadero State Hosp. vs. Scanlon, 473 U.S. 234, 238-40 (1985). In Port Auth. the issue was whether the states of New York and New Jersey in consenting to "suits, actions or proceedings" prospectively to the compact created by said states waived their respective Eleventh Amendment Immunity. The United States Supreme Court said no because the language did not specifically consent to be sued in federal court. In Atascadero the question was with regard to prospective lawsuits under the California Constitution (Cal.Const., Art.III, Section 5). The United

States Supreme Court said the language thereof did not specifically state that California would be subject to suit in federal court.

This is a notable and important decision of the United States Court of Appeals as it applies such stringent standard for waiver of a states' Eleventh Amendment Immunity not to prospective causes of actions but existing causes of action which become the liability of the state through a merger statute.

In the instant matter, Petitioner had raised a cause of action (claim) against the University of Illinois Athletic Association, an Illinois not-for-profit corporation, under 42 U.S.C., Section 1983, which existed prior to June 29, 1989, when the State of Illinois passed its special legislation occasioning the merger of the Athletic Association into the Board of Trustees of the University of Illinois stating unequivocally that the Board

of Trustees "shall be responsible and liable for all the liabilities and obligations" of the Athletic Association. Ill.Rev.Stat., ch.144, par. 28d(d)(4) (1989).

This is a case of first impression as to the application of Port Auth. and Atascadero to such a merger statute as to a pre-existing cause of action existing at the time of the merger. There are no decisions extending the strict standard of language of a state's waiver of its Eleventh Amendment Immunity retroactively to a cause of action that becomes the responsibility and liability of a state agency following a merger statute.

The key interpretation of the merger statute in question would seem to rest upon the language of said statute that "any claim existing or action or proceeding pending by or against" the Illinois Athletic Association "may be prosecuted to judgment as if the

merger had not taken place, or the surviving corporation may be substituted in its place." Ill.Rev.Stat., ch.144, par.28d(d)(4)(1989).

This language is specific that any claim or action, ie 42 U.S.C., Section 1983 action against the merging corporation Illinois Athletic Association which action is pending may be prosecuted in the name of the Athletic Association or the surviving corporation the Board of Trustees may be substituted. The strict language of Port Auth. and Atascadero to define a waiver of the Eleventh Amendment Immunity by a state as to consenting to prospective actions in federal court as applicable to this merger statute, the overwhelming implication by this merger statute as indicated by Port Auth. and Atascadero would be such a waiver.

The United States Court of Appeals for the Seventh Circuit found no waiver of

Eleventh Amendment Immunity in the merger statute. The idea that a state can wrest cases from the federal courts, shielding its own corporations from federal jurisdiction is wholly inconsistent with the rational of the Eleventh Amendment. The merger statute in question has a clearly substantive effect in transferring the pre-existing liability and obligations of the Athletic Association to the Board of Trustees and follows specifically the Illinois not-for Profit Corporation Act of 1986:

> (e) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations

> may be prosecuted to judgement as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any of such corporations shall be impaired by such merger or consolidation.

Ill.Rev.Stat., ch.32, par.111.50(e) (1986).

Therefore, the surviving corporation stands in the shoes of the disappearing corporation in every respect. Krull v. Celotex Corp., 61 F.Supp. 146, 148 (N.D.Ill.1985). When the terms of a statute are not specifically defined the words must be given their ordinary understood meanings as construed to the purposes and objectives of the statute. People v. Hicks, 101 Ill.2d 355, 371, 78 Ill.Dec. 354, 4652 N.E.2d 473 (1984).

By both their common meaning and their interpreted meaning in the case law the terms of the merger statute in question is a waiver of the Board of Trustees Eleventh Amendment Immunity, as surviving corporation.

The Board of Trustees by the merger statute agrees to be responsible and liable for any action or proceeding pending against the Illinois Athletic Association may be prosecuted to judgment either in the name of the Illinois Athletic Association or the Board of Trustees may be substituted in its place. A 42 U.S.C., Section 1983 cause of action proceeding was pending in the United States District Court for the Central District of Illinois. This is the existing action pending at the time of the merger statute in federal court proceedings. It is an action the Board of Trustees agreed to be responsible and liable for and agreed to prosecute to judgment

in the pending proceedings before the federal court, whether in the name of the Athletic Association or in its own name.

CONCLUSION

The United States Supreme Court should address the issue of whether or not the strict standard of waiver required for a state's waiver of its Eleventh Amendment Immunity in consenting to be subject to lawsuit in federal court applies to pre-existing lawsuits in federal court which becomes a liability of the state or its agency following a merger statute whose language makes the state or state agency responsible for such lawsuit's prosecution to judgment. The Petitioner asks this Court to grant a writ of certiorari to resolve this issue or in the alternative affirmatively apply the strict standard of Port Auth. and Atascadero as to the merger statute in

question in that such language of the merger statute by such overwhelming implication leaves no other reasonable construction that as to the pending lawsuit proceeding in federal court against the Illinois Athletic Association should be prosecuted to judgment by the Board of Trustees in accordance with the strict unequivocal language of the merger statute, Ill.Rev.Stat., ch.144, par.28d(d)(4) (1989).

Respectfully submitted,

Marvin Gerstein
803 S. Grove
Urbana, Illinois 61801
(217)367-8734

Attorney for Petitioner

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 89-3414 and 90-1075

WILLIAM A. KROLL,

Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, an Illinois Public Corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 89 C 2014—**Harold A. Baker**, *Chief Judge.*

ARGUED JANUARY 9, 1991—DECIDED JUNE 17, 1991

Before WOOD, JR., COFFEY, and MANION, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* William Kroll, a former employee of the University of Illinois Athletic Association, took issue with the timing of and reasons for his discharge. He filed this suit on January 6, 1989, seeking damages from the Athletic Association, the Board of Trustees of the University of Illinois ("Board"), and Neale Stoner, individually and in his official capacity as director of the Athletic Association ("Stoner"). The district court concluded that the Board was entitled to eleventh amendment immunity and for this reason, as well as others not important to this decision, Kroll's complaint was dismissed on June 13, 1989, with leave to refile.

EXHIBIT A

When Kroll filed an amended complaint on July 18, 1989, he requested relief under 42 U.S.C. § 1983, as well as various state law theories, and named as defendants only the Athletic Association and Stoner. To his surprise, however, the Athletic Association no longer existed. On June 29, 1989, the Illinois General Assembly had passed special legislation allowing the Athletic Association, a not-for-profit corporation, to merge into the Board. Public Act 86-6, 1989 Ill. Legis. Serv. 299, 300-01 (West) (codified at ILL. REV. STAT. ch. 144, para. 28d). The two entities had thereafter entered into a merger agreement and filed articles of merger with the Illinois Secretary of State. On June 30, 1989, with the Secretary's issuance of a certificate of merger, the Board became the surviving corporation and the Athletic Association ceased to exist as a separate entity. ILL. REV. STAT. ch. 144, paras. 28d(c)(1), (d)(2); Plan of Merger ¶ 1.3.

The Board, now appearing as the surviving entity of the merger, reasserted its eleventh amendment immunity from suit. The district court rejected this argument by means of an order entered on October 4, 1989, and a supplemental order entered on December 12, 1989. These interlocutory orders were immediately appealable under the rationale set forth in *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985), and as a result we have appellate jurisdiction to decide the question of law presented by the Board's timely notices of appeal. *Accord Chrissy F. ex rel. Medley v. Mississippi Dep't of Pub. Welfare*, 925 F.2d 844, 848-49 (5th Cir. 1991) (denial of motion to dismiss on eleventh amendment grounds is immediately appealable); *Schopler v. Bliss*, 903 F.2d 1373, 1376-78 (11th Cir. 1990) (same); *Dube v. SUNY*, 900 F.2d 587, 594 (2d Cir.) (same), *petition for cert. filed on other issues sub nom. Wharton v. Dube*, 59 U.S.L.W. 3278 (U.S. Oct. 9, 1990); *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir.) (same), *cert. denied*, 110 S. Ct. 501 (1989); *see also R.R. Donnelley & Sons Co. v. FTC*, No. 91-1447, slip op. at 4 (7th Cir. Apr. 29, 1991). *But see Libby v. Marshall*, 833 F.2d 402, 404-07 (1st Cir. 1987) (state officials sued in their official capacity for

injunctive relief cannot make interlocutory appeal from district court's denial of motion to dismiss on eleventh amendment grounds).[1]

The eleventh amendment to our Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. That language seems plain enough, but eleventh amendment jurisprudence has not precisely followed the text of the amendment. Heavily influenced by the judicially created doctrine of sovereign immunity, *see Port Auth. Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868, 1872 (1990) [hereinafter *PATH*], the Supreme Court has broadened the amendment's language in some respects and narrowed it in others.

Today, eleventh amendment issues may arise whenever a private party files a federal lawsuit against a state, a state agency, or a state official. The effect of the amendment may differ, however, depending on the category of defendant. *Brunken v. Lance*, 807 F.2d 1325, 1328-29 (7th Cir. 1986). We therefore begin an eleventh amendment analysis by looking at the caption of the lawsuit.

Private party suits against a state are easy to identify and the analysis is relatively straightforward. Put simply, a state may claim immunity from suit in federal court and must be dismissed from the litigation unless there exists one of two well-established exceptions. *See id.*; *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam). First, a state

[1] Neither of the parties before this court appears overly concerned that Kroll's amended complaint attempts to sue an entity that, as a technical matter, no longer exists. This interlocutory appeal may not be the proper place to address that anomaly, however, *see K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 855 (7th Cir. 1990) (discussing doctrine of pendent appellate jurisdiction), and, in any event, our decision on the eleventh amendment issue allows us to sidestep the matter.

may by unequivocal language waive the protections of the eleventh amendment and thereby consent to suit in federal court. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). Second, Congress may by unequivocal language use its enforcement powers under the fourteenth amendment to abrogate the states' eleventh amendment immunity. *See id.*; *see also id.* at 246 ("When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.") (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) [hereinafter *Pennhurst II*] (citing *Quern v. Jordan*, 440 U.S. 332 (1979)).

State agencies are treated the same as states. *See Pugh*, 438 U.S. at 781-82; *Gleason v. Board of Educ.*, 792 F.2d 76, 79 (7th Cir. 1986). Indeed, a state agency *is* the state for purposes of the eleventh amendment. *Davidson v. Board of Govs.*, 920 F.2d 441, 442 (7th Cir. 1990); *see also Pennhurst II*, 465 U.S. at 100 ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the eleventh amendment."). This is so, moreover, "regardless of the nature of the relief sought." *Id.*; *Gleason*, 792 F.2d at 79. The only new issue, therefore, is whether a particular defendant is really a state agency, i.e., whether an entity is more like " 'an arm of the State' " than a county or city. *Kashani v. Purdue Univ.*, 813 F.2d 843, 845 (7th Cir.) (quoting *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)), *cert. denied*, 484 U.S. 846 (1987); *see also Monell v. Department of Social Servs.*, 436 U.S. 658, 690 n.54 (1978).

State officials present a more complicated analysis, but one that is set forth rather neatly in *Kentucky v. Graham*, 473 U.S. 159 (1985). Suits against state officials are sometimes permissible, and the key inquiry is whether the state is " 'the real, substantial party in interest.' " *Pennhurst II*, 465 U.S. at 101 (citing *Ford Motor Co. v. Department of Treas.*, 323 U.S. 459, 464 (1945)). Personal-capacity suits raise no eleventh amendment issues even

though an official might have the requisite nexus to the state in order for his or her actions to be labelled state action. *See Graham*, 473 U.S. at 165-67. A victory in such a suit, however, is a victory against only the individual defendant; an award of damages may be executed only against that official's personal assets. *Id.* at 165-66. Official-capacity suits, in contrast, are deemed to be against the " 'entity of which an officer is an agent.' " *Id.* at 165 (quoting *Monell*, 436 U.S. at 690 n.55). Accordingly, official-capacity suits for retrospective relief—i.e., money damages payable from the state treasury—generally implicate the eleventh amendment in the absence of a waiver by the state or a valid congressional override. *See Quern v. Jordan*, 440 U.S. 332 (1979). Under an exception to the general rule, however, official-capacity actions may not be barred by the eleventh amendment insofar as they request prospective relief—i.e., an injunction or a declaratory judgment and monetary damages that are "ancillary" to either. *Graham*, 473 U.S. at 169 n.18; *Ex Parte Young*, 209 U.S. 123 (1908).

The suit before the district court involved both an action against a state agency as well as personal-capacity and official-capacity actions against Stoner. Only the Board, however, has appealed and only the Board's immunity, therefore, need be addressed. This acknowledgment, in turn, leads us to *Cannon v. University of Health Sciences/Chicago Medical School*, 710 F.2d 351 (7th Cir. 1983).

In *Cannon*, this court concluded that the Board was a state agency and, as such, that it was entitled to eleventh amendment immunity. *Id.* at 356-57. Kroll does not contest the validity of our analysis in *Cannon* (and we therefore do not revisit its holding)[2] but he does try to circumvent the case.

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[2] This determination requires a fairly fact-intensive analysis. *See Benning v. Board of Regents*, 928 F.2d 775, 777 (7th Cir. 1991) (citing *Soni v. Board of Trustees*, 513 F.2d 347, 352 (6th Cir. 1975) ("Each state university exists in a unique governmental context,

(Footnote continued on following page)

Kroll first cites *Quern*, a suit against state officials in which the Supreme Court observed that "a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." 440 U.S. at 337. The Athletic Association, Kroll contends, raised funds solely from such sources as ticket sales, alumni donations, and sales of memorabilia; it did not accept money from the state treasury. In addition, the Athletic Association may have possessed insurance coverage from outside sources; Kroll believes that the potential proceeds from those policies would also comprise a source of income other than the state treasury. Kroll argues, therefore, that his judgment would not have to be satisfied by "public funds in the state treasury" and that the eleventh amendment therefore does not apply.

The flaw in this argument is that it assumes that the eleventh amendment does not apply unless and until a private party seeks a money judgment payable from the state treasury. The Supreme Court, however, faced this same assumption in *Cory v. White*, 457 U.S. 85 (1982), and flatly rejected it. As the Court made clear in *Cory*, the quoted language from *Quern* is relevant only to suits against state officials. *Id.* at 90-91. Here, in contrast, we have a suit against a state agency, and that agency must be dismissed from this litigation in the absence of one of the two previously noted exceptions. *Pugh*, 438 U.S. at 782. Kroll's argument may be relevant as to Stoner, therefore,

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[2] *continued*

and each must be considered on the basis of its own peculiar circumstances."), *cert. denied*, 426 U.S. 919 (1976)). Courts undertaking this analysis have produced decisions on both sides of the fence, *compare Kovats v. Rutgers*, 822 F.2d 1303 (3d Cir. 1987) (denying immunity), *with Schuler v. University of Minn.*, 788 F.2d 510 (8th Cir. 1986) (granting immunity), *cert. denied*, 479 U.S. 1056 (1987), but the bulk of them conclude that a state university is entitled to eleventh amendment immunity. *See Kashani*, 813 F.2d at 845.

but it is not relevant as to a state agency like the Board.[3] *Accord Thompson v. Illinois Dep't of Mental Health & Developmental Disabilities*, 753 F. Supp. 219, 221 (N.D. Ill. 1990).

Kroll also argues that the Board, as successor to the Athletic Association, cannot invoke the eleventh amendment because that defense was unavailable to the Athletic Association.[4] Even assuming, however, that the Athletic Association was not entitled to eleventh amendment immunity, a contention that we need not and do not address, Kroll's argument must still fail. The Board is still the Board, regardless of its status as a successor entity, and

---

[3] Of course, the sources of income mentioned by Kroll may be relevant to the argument that the Board's ties to the public fisc are now insufficient to allow the Board to be characterized as a "state agency" for purposes of the eleventh amendment. Kroll has not raised this argument, however, and it is in any event unlikely that the funds received from activities formerly conducted by the Athletic Association would render significantly less substantial the Board's ties to the state treasury.

We would also note that *Cannon* rejected Kroll's argument insofar as it might apply to a state official. 710 F.2d at 357; *cf. In re San Juan Dupont Plaza Hotel Fire Litig.*, 888 F.2d 940, 945 (1st Cir. 1989); *Markowitz v. United States*, 650 F.2d 205, 206 (9th Cir. 1981) (per curiam).

[4] As support for this argument, Kroll cites only *Robinson v. KFC Nat'l Mgmt. Co.*, 171 Ill. App. 3d 867, 525 N.E.2d 1028, 121 Ill. Dec. 721 (1st Dist.) (successor corporation could not invoke a defense that was unavailable to its predecessor corporation), *appeal denied*, 122 Ill. 2d 594, 530 N.E.2d 264, 125 Ill. Dec. 236 (1988). *Robinson*, however, cannot provide a basis for concluding that Illinois has waived its eleventh amendment immunity. As an initial matter, it is far from clear whether an Illinois appellate court may effect a waiver of the state's immunity. *See generally* ILL. CONST. art. 13, § 4. But even if an Illinois appellate court could accomplish such a result, it has not done so here. *Robinson* says absolutely nothing about sovereign immunity, either common law or constitutional, and, therefore, cannot satisfy the requirement that waivers of eleventh amendment immunity are effective only if they use unequivocal language.

in the absence of waiver or congressional abrogation must be accorded the respect due a state under the eleventh amendment. Kroll will be successful, therefore, only if he can establish one of these two exceptions.

We take the easier analysis first: this is not a case where Congress has abrogated the states' eleventh amendment immunity. Indeed, Kroll's only federal claim, and therefore the only claim that could possibly satisfy this exception, is his request for relief under 42 U.S.C. § 1983. The Supreme Court, however, long ago dispelled the notion that section 1983 abrogated the states' eleventh amendment immunity,[5] and suits filed under that statute must still pay heed to the eleventh amendment.

The only other possibility is waiver. We can give effect to a waiver, however, " 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' " *PATH*, 110 S. Ct. at 1873 (quoting *Atascadero*, 473 U.S. at 239-40). And here, the only plausible basis for that type of waiver is a provision of the special legislation that allowed the Board to merge with the Athletic Association. In its entirety, that provision states:

> The Board of Trustees of the University of Illinois shall be responsible and liable for all the liabilities and obligations of each of the corporations so merged; and any claim existing or action or proceeding pending by or against either of such corporations may be prosecuted to judgment as if such merger had not taken place, or the surviving corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of either of such corporations shall be impaired by such merger.

ILL. REV. STAT. ch. 144, para. 28d(d)(4).

---

[5] *See Quern*, 440 U.S. at 341 (section 1983 does not "override the traditional sovereign immunity of the States"); *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989).

The district court correctly identified a waiver in that statutory language, but as we view it that waiver is not effective in this eleventh amendment context. In a series of opinions of which *PATH* is the most recent, the Supreme Court has continually emphasized the very stringent nature of the standard used to determine whether a state has waived its eleventh amendment immunity. In *PATH*, for example, New York and New Jersey consented " 'to suits, actions, or proceedings of any form or nature at law, in equity or otherwise.' " 110 S. Ct. at 1873 (quoting N.J. STAT. ANN. § 32:1-157; N.Y. UNCONSOL. LAWS § 7101 (McKinney)). That language was broad, said the Supreme Court, but was nonetheless ambiguous with respect to eleventh amendment immunity because it did not specifically indicate the states' willingness to be sued in federal court. *Id.* In *Atascadero*, a provision of the California Constitution provided that " '[s]uits may be brought against the State in such manner and in such courts as shall be directed by law.' " 473 U.S. at 241 (citing CAL. CONST. art. III, § 5). Again, the Supreme Court held that this language was insufficient because it did not "specify the State's intention to subject itself to suit in *federal court*." *Id.*

Here, Illinois law provides for a limited relaxation of the general rule that tort suits against the Board may be pursued only in the Illinois Court of Claims.[6] The question then becomes, "How far does this waiver extend?" Kroll argues that the legislature had notice of his claim in federal court and that the broad language of the merger statute evidences no objection to his suit. A state's failure to object, however, is not a waiver of eleventh amendment

[6] ILL. REV. STAT. ch. 37, para. 439.8 (conferring exclusive jurisdiction in Illinois Court of Claims over tort suits against the Board that would lie against a private person or corporation in a civil suit); *id.* ch. 144, para. 22 ("any suit against the Board based upon a claim sounding in tort must be filed in the Court of Claims"). Indeed, this court recently used a similar rationale to affirm the dismissal of tort claims brought against the governing body of Northern Illinois University. *See Benning*, 928 F.2d at 777-78.

immunity. There exists, moreover, a reasonable alternative construction of the statute that would not involve a waiver of eleventh amendment immunity. *See Atascadero*, 473 U.S. at 241. Specifically, the legislature might have intended the merger statute to allow actions only in other Illinois state courts, and a state does not waive its eleventh amendment immunity by consenting to suit only in its own courts. *See, e.g., PATH*, 110 S. Ct. at 1873.

If the statutory language cited from *PATH* and *Atascadero* does not meet the Supreme Court standard, then it is difficult to see how the language in the Illinois statute can satisfy that test. At best, the evidence of waiver is ambiguous; the language might consent to suit in federal court, but then again it might not. And under these circumstances, federal courts are loath to find a waiver; the "vital role of the doctrine of sovereign immunity in the federal system" demands that we err, if at all, on the side of immunity. *See Pennhurst II*, 465 U.S. at 99. For purposes of the eleventh amendment, therefore, an ambiguous waiver is no waiver at all.

The Board was entitled to claim immunity under the eleventh amendment and, as such, the district court's order and supplemental order must be and are hereby REVERSED and REMANDED with instructions to dismiss the Board from this suit.[7]

The parties shall bear their own costs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[7] Our analysis would also support an alternative basis for dismissing this action. This court has jurisdiction only by virtue of 42 U.S.C. § 1983, the remaining state law claims being advanced under the theory of pendent jurisdiction. A state agency with eleventh amendment immunity, however, is not a "person" within the meaning of section 1983. *Will*, 491 U.S. 58.

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: June 17, 1991

Honorable HARLINGTON WOOD, JR., Circuit Judge

Honorable JOHN L. COFFEY, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

Nos. 89-3414 and 90-1075

WILLIAM A. KROLL,
Plaintiff-Appellee,
vs.

BOARD OF TRUSTEES OF THE UNIVERSITY
OF ILLINOIS, an Illinois Public Corporation,
Defendant-Appellant.

Appeals from the United States District Court for the
Central District of Illinois, Danville Division
No. 89 C 2014, Judge Harold A. Baker

These causes were heard on the record form the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed

from be, and the same are hereby, REVERSED and REMANDED, with instructions to dismiss the Board from the suit, the parties shall bear their own costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 22, 1991

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Nos. 89-3414 and 90-1075	)	Appeal from the United States District Court for the Central District of Illinois, Danville Division.
WILLIAM A. KROLL, Plaintiff-Appellee, vs. BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, an Illinois Corporation, Defendant-Appellant.	)	No. 89 C 2014 Harold A. Baker Chief Judge

O R D E R

On consideration of the petition for rehearing with suggestion for rehearing in banc filed in the above-entitled cause by plaintiff-appellee on July 1, 1991, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

EXHIBIT B

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing in banc be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

WILLIAM A. KROLL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 89-2014
	)	
NEALE R. STONER, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the court for hearing on the defendants' motion to dismiss the first amended complaint. The plaintiff appears through Marvin Gerstein. The defendants appear through Edward Rawles.

The defendants' motions are denied with the exception that the motion to dismiss the plaintiff's claim for breach of contract is allowed. The plaintiff is given leave to plead over within twenty-one (21) days.

The defendants' motion for Rule 11

sanctions is denied. The law is far from clear on the subject presented in the motions. In fact, Mr. Rawles candidly stated he thought it was a question of original impression. I agree. I think it is a novel question, and Rule 11 is not intended to dissuade lawyers from presenting novel theories or pursuing innovative remedies.

The parties are directed to file a discovery schedule calendar with the court within fourteen (14) days of this date.

The cause is allotted for further status hearing by telephone conference January 3, 1990, at 9:00 a.m

ENTER this 4th day of October, 1989.

HAROLD A. BAKER
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

WILLIAM A. KROLL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 89-2014
	)	
NEALE R. STONER, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW
AND ORDER

This is an action based on 28 U.S.C., Section 1343 and 42 U.S.C., Section 1983. Plaintiff's 1983 action is based on an alleged violation of First Amendment rights.

The plaintiff, William Kroll, served as strength coach for the Athletic Association of the University of Illinois. He alleges that Neale Stoner, the Association's Athletic Director, refused to reappoint him as strength coach because Kroll openly questioned certain conduct and hiring practices of the

Association and the football team. The plaintiff seeks $50,000 actual damages, 1.8 million in consequential and other damages, and 2 million dollars in punitive damages.

Count I of the plaintiff's complaint is a Section 1983 action against Neale Stoner and the Athletic Association. Counts II and III are breach of contract and retaliatory discharge claims against the Athletic Association.

Subsequent to the filing of the complaint, the Board of Trustees of the University of Illinois and the Athletic Association of the University of Illinois merged. After the merger, only the Board of Trustees survives.

In an order dated October 4, 1989, the court denied the Board's and Stoner's motions to dismiss Count I. The defendants argued that the Eleventh Amendment barred the

plaintiff's action in federal court under the rule announced in Cannon v. University of Health Sciences, 710 F.2d 351 (7th Cir. 1983).

DISCUSSION

In Cannon, the Seventh Circuit held that the University of Illinois is an arm of the State for Eleventh Amendment purposes. Id. at 357. Thus, Section 1983 actions against the University or its officials are barred from federal court unless the State consents. Edelman v. Jordan, 415 U.S. 651, 678 (1974).

Article I, paragraph 1.6(B) of the Articles of Merger states:

> The Board of Trustees of the University of Illinois shall henceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged; and any claim existing or action or proceeding pending by or against either of such corporations may be prosecuted to judgment as if such merger had not taken place . . . .

The plain language of the Articles of Merger

state that pending claims may be prosecuted to judgment as if there had been no merger and that the University of Illinois assumed responsibility for any judgments obtained against the Athletic Association. The present case was "pending" when the merger occurred; the plaintiff filed suit on January 6, 1989, and the merger occurred on June 30, 1989. The court cannot imagine a clearer indication of State consent.

Thus, defendants' motions are hereby denied.

ENTER this 12th day of December, 1989.

_____

HAROLD A. BAKER
CHIEF UNITED STATES
DISTRICT JUDGE

FILED
OCT 4 1991
OFFICE OF THE CLERK

(2)

No. 91-438

In The

Supreme Court of the United States

October Term, 1991

WILLIAM A. KROLL,

Petitioner,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, AN ILLINOIS PUBLIC CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD H. RAWLES
RENO, O'BYRNE & KEPLEY, P.C.
501 West Church Street
P.O. Box 693
Champaign, IL 61824-0693
(217) 352-7661

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 91-438

In The

Supreme Court of the United States

October Term, 1991

WILLIAM A. KROLL,

Petitioner,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, AN ILLINOIS PUBLIC CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Board of Trustees of the University of Illinois, a body corporate and politic of the State of Illinois, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 934 F.2d 904 (1991).

The respondent accepts the Jurisdictional Statement and Statement of the Case as presented by the petitioner. The statutory and constitutional provisions involved are set forth in the petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

THE OPINION BELOW WAS NOT BASED ON THE APPLICABILITY OF THE ELEVENTH AMENDMENT TO A PENDING CAUSE OF ACTION FOLLOWING THE MERGER OF A CORPORATION INTO A STATE ENTITY; RATHER, THE DECISION RESTED ON A FINDING THAT THE ENABLING LEGISLATION FOR THE MERGER DID NOT CONTAIN THE REQUISITE ELEVENTH AMENDMENT WAIVER LANGUAGE.

1. The decision of the Seventh Circuit does not raise the first question presented in the petition.

This case does not present the factual scenario necessary for this Court's clear resolution of the first question presented by the petitioner. That is, whether the Eleventh Amendment is applicable to a lawsuit pending in a federal court following a merger, wherein the surviving corporation is a state agency. A necessary factual prerequisite to this Court's resolution of the question presented is a finding that the State of Illinois waived its Eleventh Amendment immunity through the legislative statute in question. The Seventh Circuit Court of Appeals correctly held that the language of the statute did **not** contain the explicit waiver language required by this Court's prior decisions. The Seventh Circuit thus did not reach the question of whether the Eleventh Amendment immunity would apply to a pending case since the merger statute was found deficient in the waiver language. Because the statute in question did not meet the Eleventh Amendment waiver test, the question presented by petitioner could be resolved only by rendering an impermissible advisory opinion. The question now put to this Court cannot be extracted from the opinion below.

2. The questions delineated do not present important questions of federal law.

This question regarding applicability of Eleventh Amendment immunity to a pending cause of action is not sufficiently important to warrant this Court's review. The facts of this case are clearly unique, and deciding the question posed by petitioner will affect few, if any, other litigants. As petitioner has set forth in his statement of the case, an action was pending in the district court against the Athletic Association. The complaint was dismissed on June 13, 1989, with leave to refile. On June 29, 1989, the General Assembly of the State of Illinois passed legislation providing for the dissolution of the Athletic Association and the merger of that entity into the Board of Trustees of the University of Illinois. The petitioner made no claim that the Board of Trustees of the University was not a state entity for purposes of Eleventh Amendment immunity. On July 18, 1989, the petitioner filed his amended complaint, again naming the Athletic Association as a defendant. The Board of Trustees, entered its appearance as the surviving entity of the then defunct Athletic Association, and filed its motion to dismiss asserting Eleventh Amendment immunity. The likelihood of a recurrence of such unique facts as this is extremely remote. Accordingly, this case is not worthy of certiorari.

The second question presented by petitioner is also fact specific, and requests this court to review language of a State of Illinois merger statute and render an opinion on whether that statute met the Eleventh Amendment immunity waiver test. Acceptance of review of this case

for this purpose would be of minimal public benefit. In a long line of decisions, this Court has set forth the standards to judge state statutory waiver language in ascertaining whether the state has waived its Eleventh Amendment immunity. This Court should not accept cases to make *de novo* reviews of such statutes to determine if the language meets the Eleventh Amendment waiver test. Such a process is more appropriately addressed by federal courts at the district and court of appeals levels.

3. The decision of the Court of Appeals is consistent with controlling decisions of this Court.

The Seventh Circuit correctly applied the existing standard of prior decisions of this Court in deciding the waiver issue. This Court has clearly enumerated the standards required of state statutory language to constitute waiver of a state's Eleventh Amendment immunity. The language of the merger statute at issue, Ill.Rev.Stat., Ch. 144, ¶28d(d)(4), did not meet the strict established requirements set forth within decisions of this Court.

The petitioner acknowledges that the waiver question is an essential issue in this case. The petitioner, however, has asserted that because the cases of this Court that were relied on dealt with prospective lawsuits, as opposed to an existing cause of action that subsequently became the liability of the state through a merger statute, a different waiver standard should be applied. The Seventh Circuit Court of Appeals followed established case law of this Court in determining that the statutory language did not meet the waiver test. Having determined

that, it was not necessary for the lower court to address whether a waiver applied to the unique situation at hand. Similarly, if this Court were to grant certiorari, the need to resolve petitioner's first question would be contingent upon a finding by the Court that the merger statute contained the requisite language to constitute waiver of the state's Eleventh Amendment immunity.

In support of his position that the merger statute contained the necessary waiver language, the petitioner contends that waiver "impliedly" exists because the statute provided that "any claim existing or action or proceeding pending by or against" the Athletic Association could be "prosecuted to judgment". Such an argument, however, ignores an important aspect of this court's decision on what is required to constitute a waiver of Eleventh Amendment immunity.

This Court has clearly denoted that there are two prongs to the waiver of a state's Eleventh Amendment immunity. This inquiry encompasses not merely **whether** it may be sued, but **where** it may be sued. *Port Authority Trans-Hudson Corp. v. Feeney*, ___ U.S. ___, 110 S.Ct. 1868, 1873 (1990); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241-242 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 150 (1981). The Illinois statutory provision relied on by petitioner as constituting waiver only meets the test of the first prong, that is **whether** the State may be sued. The statutory language, however, is deficient as to the express language this Court requires as to **where** the state may be sued.

The statute does not contain the unequivocal indication that the state intended to consent to **federal** jurisdiction. There is no express provision allowing the state to be subjected to suit **in federal court.** The state therefore did not unmistakably and unequivocally consent to suit against it in federal court, as this Court's decisions have consistently required. *Port Authority Trans-Hudson Corp. v. Feeney*, ___ U.S. ___, 110 S.Ct. 1868, 1873 (1990); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241-242 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 150 (1981) While there is an obvious statutory waiver of sovereign immunity in the language of the legislation, this Court has consistently held that such a waiver cannot be automatically read to waive Eleventh Amendment immunity to such suit **in federal court.** *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 468-469 (1945); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); *Port Authority Trans-Hudson Corp. v. Feeney*, ___ U.S. ___, 110 S.Ct. 1868, 1873 (1990); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241-242 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 150 (1981).

Moreover, there is a more reasonable alternative construction of the language within the statutory provision that would not involve a waiver of the Eleventh Amendment immunity. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985). Illinois law provides that tort suits against the Board of Trustees of the University of Illinois are to be pursued only in the Illinois Court of Claims.

Ill.Rev.Stat., Ch. 37, ¶439.8. The state may therefore have intended a limited waiver of its own sovereign immunity. Such a waiver does not constitute waiver of the state's Eleventh Amendment immunity. *Port Authority Trans-Hudson Corp. v. Feeney*, ___ U.S. ___, 110 S.Ct. 1868, 1873 (1990).

It is irrelevant that the state may have had notice of the pending claim of petitioner at the time the enabling legislation was passed, or that the state did not raise any objection to the claim at that time. A failure to object does not constitute waiver of Eleventh Amendment immunity. A similar argument was rejected by this Court in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).[1] Regardless of the situation and the context, this Court has consistently held that in all instances, an unequivocal indication of the state's intent to consent to federal jurisdiction is required. The asserted "implied consent" or "implied waiver" because the state had notice of the pending claim in the instant case is equivalent to a "constructive consent" argument. This Court has specifically held that "constructive consent" is not a doctrine commonly associated with the surrender of constitutional rights. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238, fn. 1 (1985).

---

[1] In *Atascadero*, the Court of Appeals had held the Eleventh Amendment did not bar an action where the State had "implicitly consented to be sued" as a recipient of funds under programs established by the Rehabilitation Act. This Court rejected the reasoning that a state's consent to suit could be inferred from participation in programs funded by the Act.

The language of the Illinois statutory provision in question, Ch. 144, ¶28d(d)(4), does not meet the express waiver requirements of this Court's decisions. These standards, pronounced in this Court's unbroken line of authority involving waiver of a state's Eleventh Amendment immunity, were correctly applied by the United States Court of Appeals for the Seventh Circuit in this case.

4. Granting certiorari would necessitate consideration of an issue raised but not addressed by the Court of Appeals.

An unresolved issue presented to the Seventh Circuit Court of Appeals also serves as a basis for denial of this request for certiorari. In the Court of Appeals, the respondent asserted that the pre-merger entity, the Athletic Association of the University of Illinois, was entitled to Eleventh Amendment immunity. The basis of the respondent's position was that if this entity had the required state nexus to attain status as a state actor for purposes of the action brought pursuant to 42 U.S.C. §1983, it would also meet the same criteria for the Eleventh Amendment protection extended to the University of Illinois Board of Trustees. The Seventh Circuit, however, never reached this issue advanced by the respondent because of its resolution of the case based solely on the statutory waiver question. (Appendix to Petitioner for Writ, Exhibit A at p. 7) If this Court were to grant certiorari on the basis of the questions presented by the respondent, the need for resolution of this secondary issue, also not addressed by the Court of Appeals, would resurface.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD H. RAWLES
RENO, O'BRYNE & KEPLEY, P.C.
501 West Church Street
P.O. Box 693
Champaign, IL 61824-0693
(217) 352-7661

Attorney for Respondent

(3)

Supreme Court, U.S.
FILED
OCT 28 1991
OFFICE OF THE CLERK

NO. 91-438

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIAM A. KROLL,

Petitioner,

vs.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, AN ILLINOIS PUBLIC CORPORATION,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Marvin Gerstein
803 S. Grove
Urbana, Illinois 61801
(217)367-8734

Attorney for Petitioner

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NO. 91-438

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIAM A. KROLL,

Petitioner,

vs.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, AN ILLINOIS PUBLIC CORPORATION,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.6, Petitioner files this Petitioner's Response to Respondent's Brief in Opposition to Petitioner for Writ of Certiorari as to the arguments

raised by Respondent in their brief in opposition to the Petition for Writ of Certiorari.

1. THE RESPONDENT OVERLOOKS THE THRESHOLD ISSUE OF THE COURT OF APPEALS' DECISION IN THE RETROACTIVE APPLICATION OF THE ELEVENTH AMENDMENT TO A PENDING SUIT.

The Court of Appeals held waiver as the only possible grounds for denial of Eleventh Amendment immunity in the instant case. The court found no such waiver in the statute merging the University of Illinois Athletic Association with the University's Board of Trustees. This focus ignored fundamental constitutional and state law limitations on the exercise of Eleventh Amendment immunity. Namely, application of the Eleventh Amendment in this case violates Article III, section 2 and the Fourteenth Amendment of the Constitution of the United States, and

relevant Illinois canons of statutory construction.

Article III, section 2 of the Constitution confers federal court jurisdiction to all cases arising in diversity or under federal law. The Supreme Court's refusal to recognize state sovereign immunity in federal court spawned the Eleventh Amendment. See Chisolm v. Georgia, 2 U.S. 419 (1793). Barring federal jurisdiction over suits against states by individuals, other states and countries, the amendment incorporated state sovereign immunity into the balance of state and federal power.

The Eleventh Amendment took a discrete bite from the federal judiciary's Article III powers, delimited by the common law doctrine of sovereign immunity. The state crosses this boundary in petitioner's case, trying to confer Eleventh Amendment immunity on a

private entity. At the time Petitioner filed his suit, Respondent Athletic Association was an Illinois not-for-profit corporation, fully liable for its tortious acts. Now, with Petitioner's suit pending, the state tries, by merger, to cloak this private entity with the Eleventh Amendment. Unlike prospective application of the Eleventh Amendment, where a state exercises immunity already ceded, here the state tries to create immunity where none previously existed.

The idea that a state can wrest cases from the federal courts, shielding its own corporations from federal jurisdiction is wholly inconsistent with the rationale of the Eleventh Amendment. The Court of Appeals' interpretation of the amendment allows states to curtail federal jurisdiction at will. Article III, section 2 of the Constitution allows Congress alone to alter the

jurisdiction of the federal courts. Even Congress must follow neutral principals when doing so. United States v. Klein, 80 U.S. 128 (1872). It may not withdraw jurisdiction as a means of deciding cases.

A grant of Eleventh Amendment immunity in this case also infringes on Congressional Fourteenth Amendment powers. Petitioner has brought suit under 42 U.S.C., Section 1983, legislation passed pursuant to powers granted Congress by section 5 of the Fourteenth Amendment. That section gives Congress the prerogative to pierce a state's Eleventh Amendment immunity. In enacting Section 1983, Congress did not exercise this prerogative. Quern v. Jordan, 440 U.S. 332, 341 (1979). A state can bar federal jurisdiction of a Section 1983 suit against it. No such immunity obtains for individuals or entities outside the bounds of state agency. See Mt.

Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). Respondent Athletic Association falls within this category. The state, by merger, would transform its actions into state action protected by the Eleventh Amendment. Just as a state could not convert the individual acts of a natural person to state action, neither can it subsume the acts of the corporate person.

The Court of Appeals overlooked relevant principles of Illinois state law, as incorporated by the Erie doctrine. Erie R.R. v. Tompkins, 306 U.S. 64 (1938). The question of whether a state could retroactively confer Eleventh Amendment immunity on a private entity by merger is one of federal law--interpreting what the Constitution allows. The question of interpreting the merger act, however, and deciding whether it actually did

confer such immunity on the Athletic Association, is one of state law. See, e.g. United States vs. Hawaii, 832 F.2d 1116 (9th Cir.1987) (court applies state law in deciding retroactively of amendment to state sovereign immunity statute).

Illinois law presumes prospective construction of statutes. Courts will apply a statute retroactively only on express instructions from the legislature. People ex rel. Manczak v. Carpentier, 3 Ill.2d 556, 121 N.E.2d 762 (1954). Legislative enactments with solely procedural effect are the exception to this rule--courts apply them retroactively absent a saving clause. Niven v. Siqueira, 487 N.E.2d 937, 109 Ill.2d 357, 94 Ill.Dec. 60 (1985); Ogdon v. Gianakos, 415 Ill. 591, 114 N.E.2d 686 (1953). Procedure, "embraces 'pleading, evidence and practice. Practice means those legal rules which direct

the course of proceedings to bring parties into court and the course of the court after they are brought in.'" Rivard v. Chicago Fire Fighters Union, 122 Ill.2d 303, 310, 119 Ill.Dec. 336, 340, 522 N.E.2d 1195, 1199 (1988) (quoting Ogdon v. Gianakos. 415 Ill. at 596, 114 N.E.2d at 689). Substantive law, "establishes the rights whose invasion may be redressed through a particular procedure." Id. When the operation of a procedural rule affects the assertion of a substantive right or destroys the right, retroactive application is inappropriate. Moore v. Jackson Park Hospital, 95 Il.2d 223, 69 Ill.Dec. 191, 447 N.E.2d 408 (1983); Hogan v. Bleeker, 29 Ill.2d 223, 193 N.E.2d 844 (1963).

If the merger statute affects substantive a well as procedural rights, retroactive application should not be presumed. A clear legislative indication of retroactive intent

should apply only if it does not violate constitutional or state law vested rights. In re Marriage of Semmler, 107 Ill.2d 130, 481 N.E.2d 716, 89 Ill.Dec. 873 (1985). If the merger statute had purely procedural effect, its waiver provision could still maintain prospectivity. The Court of Appeals ignored this hierarchy. It assumed the merger statute retroactive as to Eleventh Amendment immunity, absent a waiver provision. The court then analyzed the statute's waiver provision by the standard of Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985), finding it deficient. Moreover, by enabling the consolidation of two entities, the statute clearly has substantive effects--transfer of the pre-existing liabilities and obligations of the Athletic Association to the surviving corporation among them. As substantive law, the merger statute merited a presumption of

prospectivity.

Retroactive application of the merger statute also violates Illinois law by interfering with the exercise of a vested right. The Court of Appeals construed the merger statute's waiver provision as a consent to state, but not federal, suit. This allowed the court to characterize Petitioner's case in purely jurisdictional terms. Consignment to state fora would not trammel any vested rights. Yet, the opinion's final footnote reveals a fallacy in this reasoning. It points out that, "a state agency with eleventh amendment immunity...is not a 'person' within the meaning of section 1983," according to the Supreme Court's holding in Will v. Michigan Dep't. of State Police, 491 U.S. 58 (1989). Thus, retroactive application of the merger act would make Section 1983 unavailable to Plaintiff, disabling the right to seek damages

for infringement of constitutional rights. Remaining state causes of action could not remedy this right.

Illinois law recognizes a vested right in accrued tort causes of action. Moore v. Jackson Park Hospital, 95 Ill.2d 223, 69 Ill.Dec. 191, 447 N.E.2d 408 (1983) (no retroactive application of statute of limitations amendment that would instantaneously bar plaintiff's suit); Rivard v. Chicago Fire Fighters Union, 122 Ill.2d 303, 119 Ill.Dec. 336, 522 N.E.2d 1195 (1988) (no retroactive application of legislation making unincorporated associations amenable to suit). Each particular cause of action in a Plaintiff's claim constitutes a vested right. Balzer v. Inland Steel Co., 100 Ill.App.3d 1071, 56 Ill.Dec. 594, 427 N.E.2d 999 (1st Dist. 1981) (retroactive application of a statute of repose which would have barred

plaintiff's strict product liability cause of action refused, despite continued availability of negligence action). See also, Hupp v. Gray, 73 Ill.2d 78, 83, 22 Ill.Dec. 513, 516, 382 N.E.2d 1211, 1214 (1978).

Barring an accrued tort cause of action may also violate federal due process guarantees. See, e.g., Hartford Fire Insurance Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1367 (6th Cir. 1984); Edwardsen v. Morton, 369 F.Sup. 1359 (D.D.C. 1973). Other authority has held that no right vests until final judgement. See, e.g. Daylo v. Administrator of Veterans Affairs, 501 F.2d 811, 818 (D.C.Cir.1974); Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir.1948).

2. THE STATE'S ATTEMPT TO RETROACTIVELY CONFER ELEVENTH IMMUNITY ON THE ATHLETIC ASSOCIATION REPRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW

Respondent cites the "unique" fact

situation of this case as grounds for denial of certiorari. The argument cut no ice--any case has unique facts. The breadth and import of its issues are what matters.

The Court of Appeals' interpretation of the Eleventh Amendment impermissibly alters the potential liabilities of private corporations. By the court's holding, a state could merge with any corporation and interpose Eleventh Amendment immunity for any crime, tort or breach of contract. The merger statute waiver provision's close tracking of the Illinois Not-For-Profit Corporation Act and the Illinois Business Corporation Act, underscores this view. A precedent which so alters the balance of state and federal powers merits Supreme Court review.

The Court of Appeals wrote in dictum that retroactive application of the merger statute completely barred Plaintiff's suit. This

presents the issue of whether the Constitution permits a state to deprive an individual of an accrued federal cause of action. It also raises the broader question of whether Due Process confers a vested right in an accrued tort cause of action.

These are constitutional issues of broad significance. In addition, Respondent believes granting certiorari could pose another constitutional question: whether the indicia of a state actor under the Fourteenth and Eleventh Amendments are identical.

3. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE PRECEDENTS OF THIS COURT.

As noted above, the Court of Appeals retroactive application of the Eleventh Amendment contravenes precedent as to the balance of state and federal power, and the Erie doctrine. Even if correct in its finding of retroactivity, the Court of Appeals

overlooked both plain meaning and case interpretation of the merger statute's waiver provision.

The seventh circuit found the merger statute's waiver provision no more compelling than those rejected in Port Authority Trans-Hudson Corporation v. Feeney, 110 S.Ct. 1868 (1990), and Atascadero. Yet, the merger statute's waiver has a procedural aspect its counterparts in those cases lacked. The provision in Port Authority consented "'to suits, actions, or proceedings of any form or nature in law equity or otherwise.'" 110 S.Ct. at 1873. This passage created rights, but did not address the method for their enforcement. The merger statute provision, by contrast, explicitly preserves extant procedures, allowing prosecution "to judgment" of a pending proceeding "as if such merger had not taken place". Despite the Court of

Appeals' holding, the passage avails no other reasonable construction. It allows Petitioner's suit to continue in federal court.

The relevant case law confirms this proposition. The waiver provision tracks the Illinois Not-For-Profit Corporation Act of 1986's section on liability following merger, and its counterpart in Illinois' version of the Model Business Corporation Act. Ill.Rev.Stat., ch. 32, par. 111.50 (1986); Ill.Rev.Stat., ch. 32, par. 11.50 (1983). The section has its antecedents in this common law. See People vs. Dunleith Bridge Co., 322, Ill. 98, 118, 152 N.E.2d 526, 538 (1926).

Cases interpreting section 11.50 of the Illinois Business Corporation Act have found no exceptions to its "any claim existing" language. Krull v. Celotex Corp., 611 F.Supp. 146, 148 (N.D. Ill.1985) (punitive damages

allowed against successor to asbestos manufacturer allowed--"the surviving corporation stands in the shoes of the disappearing corporation in every respect"); Board of Education v. Herzog Bldg. Corp., 41 Ill.App.2d 44, 190 N.E.2d 152 (1st Dist.1963).

In addition to specifically authorizing the merger of the Board and the Athletic Association, the merger statute contained a more general provision authorizing merger of any state university with its athletic association. This otherwise identical section was inserted into Article 11 of the Illinois Not-for-Profit Corporation Act. This shows legislative intent that the Act should apply to the surviving "body corporate and politic". The legislature recognized that the Act would govern the merged entity. Hence, at the time it authorized the merger, the legislature amended section 111.50 of the Illinois Not-

for-Profit Corporation Act: "(c) Such surviving or new corporation has all the rights, privileges, immunities, and powers and is subject to all the duties and liabilities of a corporation organized under this Act; however, this subsection (c) does not apply to a surviving corporation which manages and governs a State university." (amendment underlined) Ill.Rev.Stat., ch. 32, par. 111.50 (1989). Given these considerations, case law interpreting section 111.50 and counterpart in the Illinois Business Corporation Act should apply to the waiver provisions of the merger statute and the articles of merger. That case law squarely opposes Eleventh Amendment immunity for Respondent.

4. WHETHER OR NOT GRANTING OF CERTIORARI WOULD ENTAIL ANALYSIS OF NEW ISSUES IS IRRELEVANT TO THIS PETITION.

Respondent tries to shy the Court away

from a granting certiorari with the spectra of issues raised, but not addressed in the Court of Appeals. It claims that an appeal in this Court would necessitate consideration of whether the Athletic Association was a state actor for Fourteenth Amendment purposes, and if indicia of state action for purposes of the Eleventh Amendment are the same.

Whatever additional defenses Respondent might raise have no bearing on the suitability of the issue of Eleventh Amendment retroactively for Supreme Court review. If the Athletic Association's actions fell within Eleventh Amendment protection before the merger, the Court of Appeals should have decided Respondent's appeal on this basis. Instead it ventured into uncharted waters, wrongly deciding the Eleventh Amendment retroactivity question.

If the law is unsettled as to the

availability of Eleventh Amendment immunity to respondent Athletic Association before the merger, this case could present another question worthy of Supreme Court hearing. If the law is settled, it can be applied on remand. A holding, however, so specious and far-reaching as the Court of Appeals' decision should not stand.

CONCLUSION

For the reasons contained herein, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

Marvin Gerstein
803 S. Grove
Urbana, Illinois 61801
(217)367-8734

Attorney for Petitioner